(8)

No. 97-1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

VAUGHN MURPHY,

Petitioner,

vs.

UNITED PARCEL SERVICE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

STEPHEN R. McALLISTER
University of Kansas
School of Law
Green Hall
Lawrence, Kansas 66045
(785) 864-4550

KIRK W. LOWRY
Counsel of Record
PALMER, LOWRY
LEATHERMAN & WHITE LLP
112 West Sixth, Suite 102
Topeka, Kansas 66603
(785) 233-1836

Attorneys for Petitioner

151372

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

47PP

QUESTIONS PRESENTED

1. Under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12102(2)(A), should the determination whether an individual's impairment "substantially limits" one or more major life activities be made without consideration of mitigating measures, as the ADA's structure and the federal agencies Congress charged with implementing the ADA uniformly require?

2. Whether UPS "regarded" Mr. Murphy as disabled within the meaning of the ADA, 42 U.S.C. § 12102(2)(C), when UPS fired Murphy because it believed his high blood pressure precluded him from obtaining a health card under Department of Transportation regulations?

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Cited Authorities

Cited Authorities

OPINIONS BELOW

The October 22, 1996, opinion of the United States District Court for the District of Kansas granting summary judgment to UPS is reported at 946 F. Supp. 872. *See* Appendix to Petition for a Writ of *Certiorari* 7a-37a. The March 11, 1998, decision of the United States Court of Appeals for the Tenth Circuit affirming the District Court is unreported. *See id.* at 1a-6a.

STATEMENT OF JURISDICTION

This Court's jurisdiction to review the final judgment of the United States Court of Appeals for the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Tenth Circuit issued its decision on March 11, 1998. Petitioner filed a timely petition for a writ of *certiorari* on June 9, 1998, and this Court granted plenary review on January 8, 1999. 119 S. Ct. __.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 3 of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12102, defines "disability" as follows[1]:

> (2) Disability. The term "disability" means, with respect to an individual
>
> > (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> >
> > (B) a record of such impairment; or
> >
> > (C) being regarded as having such an impairment.

---

1. The Joint Appendix includes Title I of the ADA, the Equal Employment Opportunity Commission ("EEOC") regulations located at 29 C.F.R. Pt. 1630.2(g)-(j), (l)-(m), and the EEOC interpretive guidance to those regulations. Some of this material also is printed in Appendix C to the petition for a writ of *certiorari*.

Title I of the ADA, in 42 U.S.C. § 12112, prohibits discrimination in employment on the basis of disability:

> (a) General Rule. No Covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

The phrase "qualified individual with a disability" is defined in 42 U.S.C. § 12111(8):

> The term "qualified individual with a disability" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

Pursuant to a congressional directive, 42 U.S.C. § 12116, the Equal Employment Opportunity Commission ("EEOC") promulgated regulations defining important ADA terms and concepts for purposes of implementing and enforcing Title I. Relevant to this case are the following EEOC regulations:

29 C.F.R. § 1630.2

(h) Physical or mental impairment means:

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following bodily systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine. . . .

(i) Major life activities —

> means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits —

> (1) The term substantially limits means:
>
> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. * * *

(*l*) Is regarded as having such an impairment means:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

At the same time the EEOC issued the preceding regulations, and pursuant to the same formal notice and comment procedures, it promulgated Interpretive Guidance as an appendix to the regulations. That Interpretive Guidance provides in pertinent part as follows[2]:

> Section 1630.2(j) Substantially Limits
>
> * * * *
>
> The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices. * * * *
>
> Section 1630.2(*l*) Regarded as Substantially Limited in a Major Life Activity
>
> * * * *
>
> There are three different ways in which an individual may satisfy the definition of "being regarded as having a disability":
>
> > (1) The individual may have an impairment which is not substantially limiting but is perceived by the employer or other covered entity as constituting a substantially limiting impairment;
> >
> > (2) The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment; or

2. The full text of these interpretive guidance provisions is included in the Joint Appendix, 35a-46a.

> > (3) The individual may have no impairment at all but is regarded by the employer or other covered entity as having a substantially limiting impairment.
>
> An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the employee to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled. * * * *

Relevant to this particular case are Department of Transportation regulations that provide as follows:

> 49 C.F.R. § 391.41:
>
> (a) A person shall not drive a commercial motor vehicle unless he/she is physically qualified to do so. . . .
>
> (b) A person is physically qualified to drive a commercial motor vehicle if that person . . .
>
> > (6) Has no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely.
>
> 49 C.F.R. § 391.43:
>
> (f) If the blood pressure is consistently above 160/90 mm. Hg., further tests may be necessary to determine whether the driver is qualified to operate a commercial motor vehicle.

STATEMENT OF THE CASE

Vaughn Murphy has had very severe high blood pressure since at least age 10. Appendix to Petition for a Writ of *Certiorari* (hereinafter "Pet. App.") 2a, 13a. Unmedicated, his blood pressure runs approximately 250/160. *Id.*[3] Even with medication, if Murphy tries to reduce his blood pressure to normal levels, he will suffer "severe side effects such [as] stuttering, loss of memory, impotence, lack of sleep and irritability." *Id.* at 16a. According to his physician, Murphy is largely unable to function if he reduces his blood pressure to normal levels. *Id.*

Indeed, there is evidence that Murphy's major life activities of running, exercising, lifting, eating, hearing and seeing all are adversely affected, even when his hypertension is medicated. *Id.* at 13a. For example, Murphy himself testified that, even with his medication, he has limited stamina, must carefully restrict his diet, has ringing in his ears, and "runners or bubbles" that frequently flash across his vision. Joint Appendix ("J.A.") 56a-58a. Murphy further testified that his medication can give him gout that keeps him bedridden for days at a time. *Id.* at 51a. For 22 years as a mechanic prior to working for UPS, Murphy used levers or devices to lift heavy objects, avoided running, did not perform work above his head, and generally avoided heavy or very heavy work. Pet. App. 13a. Murphy also was under a doctor's orders not to hold a job involving repetitive lifting of 200 pounds or more. *Id.*

---

3. The Fifth Report of the Joint National Committee on Detection, Evaluation, and Treatment of High Blood Pressure, Vol. 153, Arch. Internal Med. 154, 161 (Jan. 25, 1993), classifies blood pressure in the following categories:

Category	*Systolic*	*Diastolic*
Normal	<130	<85
High Normal	130-139	85-89
Hypertension:		
Stage I (mild)	140-159	90-99
Stage II (moderate)	160-179	100-109
Stage III (severe)	180-209	110-119
Stage IV (very severe)	>210	>120

In early August, 1994, Murphy applied to UPS for a mechanic position. Pet. App. at 2a. UPS requires that its mechanics have: (1) a commercial drivers license (which Murphy had); and (2) a Department of Transportation ("DOT") health card, which Murphy obtained. *Id.* As part of his DOT health card application process, Murphy submitted to a physical performed by a DOT examiner, David Couch, a registered nurse. *Id.* Couch took Murphy's blood pressure, which was 186/124, and issued him a DOT health card pursuant to DOT regulations. *Id.* at 2a-3a. On August 18, 1994, UPS hired Murphy to work as a mechanic. *Id.* at 13a.

In mid-September, 1994, Monica Sloan — a UPS company nurse, was reviewing Murphy's file when she observed that Couch had taken Murphy's blood pressure as 186/124. Sloan concluded that Couch had improperly issued Murphy's DOT health card. Moreover, Sloan concluded that Murphy was not qualified to work for UPS because his blood pressure exceeded 140/90 or 140/80, which is what Sloan believed UPS's standard to be. J.A. 88a-89a, 93a-94a, 47a. After retaking Murphy's blood pressure, which was 160/102 and 164/104, on September 26, J.A. 47a-48a, UPS terminated Murphy's employment as a mechanic on October 5, 1994, ostensibly because his hypertension exceeded DOT requirements for obtaining a DOT health card. Pet. App. at 3a, 16a-17a. Murphy testified that a UPS supervisor told him (Murphy) that he was fired. J.A. 53a; *see id.* at 105a.

Murphy later filed this ADA suit against UPS. In order to state a claim under the ADA, Murphy has to satisfy three statutory requirements. First, he must prove that he has a "disability" within the meaning of the statute. In this case, that means that he must prove either that he has a physical impairment that substantially limits one or more of his major life activities, or that UPS regarded him as an individual having such an impairment. *See* 42 U.S.C. §§ 12102(2)(A), (C). Second, Murphy must prove that he is a "qualified individual with a disability," which is defined to mean "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Finally, Murphy must prove that UPS discriminated against him

> because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

Even if Murphy satisfies all three statutory requirements, UPS may raise statutorily-recognized defenses. These include: (1) that the necessary accommodations for Murphy would impose an undue hardship on UPS, 42 U.S.C. § 12112(b)(5)(A); (2) that Murphy failed a "qualification standard" that "has been shown to be job-related and consistent with business necessity," 42 U.S.C. § 12113(a); or (3) that Murphy would pose a direct threat to other individuals in the workplace. 42 U.S.C. § 12113(b).

Following discovery, the District Court granted summary judgment to UPS on all aspects of Murphy's ADA cause of action. Pet. App. 7a-37a. Relying on Tenth Circuit cases addressing the ADA, the District Court first decided that Murphy's severe hypertension should be evaluated in its medicated state in determining whether his hypertension "substantially limits" his major life activities. Pet. App. 23a-29a. Applying that standard, the court next opined that no rational factfinder could conclude that Murphy was substantially limited in any major life activities because, when Murphy is medicated, the only limitation his physician specifically imposed was a restriction on repetitive lifting of items weighing 200 pounds or more. *Id.* at 29a-32a. The District Court also rejected Murphy's "regarded as" claim, stating that UPS "did not regard Murphy as disabled, but only that he was not certifiable under DOT regulations." *Id.* at 32a.[4]

The Tenth Circuit affirmed, also finding not a single genuine issue of disputed, material fact. First, relying on its decision in *Sutton*

4. Although recognizing that these two rulings disposed of the case, the District Court went on to determine, as a matter of law, that Murphy could not perform the essential functions of the job of UPS mechanic, that UPS's "compliance" with DOT regulations was a complete defense, and that there were no reasonable accommodations UPS could have provided to Murphy to permit him to do the job. Pet. App. 33a-37a.

v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997), the Tenth Circuit held that the "substantially limits" inquiry of the first prong of the "disability" definition requires consideration of mitigating measures. Pet. App. 4a. The Tenth Circuit ruled that, as a matter of law, Murphy's severe hypertension does not substantially limit any major life activities when medication is considered. *Id.* The Tenth Circuit then concluded that Murphy also failed to state a claim under the "regarded as" prong of the definition. The court stated that UPS "did not base its termination of Murphy on an unsubstantiated fear that he would suffer a heart attack or stroke," but instead fired him "because his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles." *Id.* at 5a. In the Tenth Circuit's view, it followed as a matter of law that UPS, "in its termination decision, did not regard Murphy as having an impairment that substantially limits a major life activity." *Id.*[5]

SUMMARY OF THE ARGUMENT

Vaughn Murphy necessarily established that he has a "disability" in at least one of three ways the ADA defines that term. First, he has an impairment that substantially limits one or more of his major life activities. 42 U.S.C. § 12102(2)(A). In the alternative, UPS fired Murphy because it "regarded" him as having such an impairment. *Id.* § 12102(2)(C). In order for Murphy to establish a *prima facie* claim under Title I of the ADA, he must prove that: (1) he has a "disability"; (2) he is a "qualified individual"; and (3) UPS fired him because of his "disability. The issues before this Court involve only the first requirement. The Tenth Circuit's fundamental error in this case was to merge all three requirements, effectively holding that Murphy has no "disability" because he is not a "qualified individual" and UPS acted in reliance upon DOT regulations rather than with a discriminatory motive.

This Court recently made clear that three requirements must be satisfied in order to establish a "disability" under the first prong of

5. The Tenth Circuit also declared that, "because we have concluded that Mr. Murphy is not an individual with a disability, we need not reach the question of whether he is a qualified individual with a disability. . . ." Pet. App. 5a. "Likewise, we need not address his remaining contention, namely, that DOT regulations do not provide a defense to his ADA claim." *Id.* at 6a.

the ADA definition: the individual must suffer from (1) an impairment (2) that substantially limits (3) one or more of his major life activities. *See Bragdon v. Abbott*, 118 S. Ct. 2196 (1998). Because it is undisputed that Murphy's severe hypertension is an "impairment", the first issue in this case is whether his impairment "substantially limits" him. The Tenth Circuit erred by requiring that the "substantially limits" inquiry be made by assessing Murphy's hypertension in its medicated state.

The ADA's language and structure demonstrate that mitigating measures should not be considered in making the threshold "disability" determination. Rather, the effects of mitigating measures become relevant when making the second determination under the ADA — whether the individual is qualified for the job or program at issue. The ADA defines the term "disability" inclusively for purposes of the entire statute. 42 U.S.C. § 12102(2). Subsequently, the ADA addresses disability discrimination in different contexts — such as employment and public accommodations — in separate titles, with provisions specifically tailored to the concerns and considerations unique to those contexts. In the employment context, for example, Congress specifically provided for an additional inquiry into whether a particular disabled individual is "qualified," *i.e.*, can perform the essential functions of the job at issue, with or without reasonable accommodations. 42 U.S.C. § 12111(8). The individual also must prove that the employer discriminated on the basis of the individual's disability. 42 U.S.C. § 12112(a). In addition, Congress created at least three statutory defenses for employers.

Thus, Congress defined "disability" inclusively but provided that, in appropriate cases, the ADA's coverage may be narrowed at later stages of the inquiry. Congress did not enact a statute that makes the threshold "disability" inquiry the eye of a needle and Vaughn Murphy the camel. Rather, it is in making the "qualified individual" and statutory defense assessments, not when making the threshold determination whether Murphy has a disability, that questions regarding Murphy's medication and other ameliorative measures should be raised and addressed. *Cf. School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284-85 (1987) (under the Rehabilitation Act, the model for the ADA, "the definition of handicapped individual is

broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief"). Otherwise, the "qualified individual" requirement and statutory defenses become largely irrelevant, as the Tenth Circuit's decision demonstrates.

The result compelled by the ADA's language and structure is further confirmed by the ADA's legislative history. Congress expressly recognized that the determination whether an individual has a "disability" under the ADA is the beginning, not the ending, of the statutory inquiry. The reports of the three congressional committees that had responsibility for the ADA uniformly and clearly indicate that Congress intended the "substantially limits" determination to be made without consideration of mitigating measures. No committee members issued any dissenting or opposing views on this point.

Importantly, the federal agencies charged with implementing the ADA uniformly require that mitigating measures not be considered in making the "substantially limits" determination. Pursuant to formal notice and comment procedures, both the EEOC — the agency Congress charged with implementing Title I — and the Department of Justice, which is responsible for Titles II and III, have formally promulgated regulations and interpretive guidance requiring that the "substantially limits" determination be made without regard to mitigating measures. Because the EEOC's regulations and interpretive guidance are consistent with the ADA's language, structure and clear congressional intent, and because the EEOC promulgated the regulations and guidance pursuant to formal notice and comment procedures, the EEOC's interpretation of the ADA must be given *Chevron* deference. As it did recently in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), this Court should defer to the implementing agency's permissible construction of the ADA. "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT&T Corp. v. Iowa Util. Bd.*, 119 S. Ct. __, 67 U.S.L.W. 4104, 4112 (Jan. 25, 1999).

Even if this Court were to require consideration of mitigating measures in determining whether Murphy has a "disability," the Tenth Circuit improperly affirmed the grant of summary judgment to UPS.

Murphy produced evidence that he suffers from an impairment that substantially limits one or more of his major life activities even when he is medicated, as well as when he is not. This evidence, which the lower courts essentially ignored, precludes a grant of summary judgment in UPS's favor.

The ADA's "disability" definition also includes people who are "regarded" as disabled, even if they are not actually disabled. In the alternative, Murphy states a valid claim under this definition. UPS's only asserted reason for firing Murphy, which the Tenth Circuit relied upon exclusively in ruling in UPS's favor, was that Murphy's blood pressure is too high for him to obtain a DOT health card. That assertion supports rather than defeats Murphy's "regarded as" claim. UPS believed Murphy could not do the job, and fired him because of that belief. Whether or not DOT regulations compelled that action may be relevant to whether Murphy was a "qualified individual" under the ADA, or perhaps to certain statutory defenses that may or may not be available to UPS. But, in making the threshold "disability" determination, the DOT regulations establish rather than negate the fact that UPS "regarded" Murphy as disabled.

Murphy has established that he has a "disability" under the ADA, either because he has an "impairment that substantially limits one or more major life activities" or because UPS "regarded" him as having such an impairment. The Tenth Circuit's judgment in favor of UPS must be reversed.

ARGUMENT

This case presents a striking example of the "catch-22" situation that the Tenth Circuit's decision creates for employees with physical or mental impairments. UPS successfully argued that Vaughn Murphy, who indisputably suffers from severe hypertension that will eventually kill him, is not disabled because he can take medication to ameliorate some of the effects of his hypertension. At the same time, UPS admits that it fired Murphy precisely because UPS believed that Murphy's high blood pressure made him unfit to work in any job requiring a DOT health card. The ADA does not permit UPS to have it both ways.

Under the Tenth Circuit's interpretation of the statute, many Americans with impairments will never be given the opportunity to

demonstrate that they are qualified to work. If the effects of an impairment can be limited by mitigating measures, the Tenth Circuit's interpretation means that the ADA will not protect the individual at all, even if that individual is qualified for the job, even if reasonable accommodations are available (or even unnecessary) and will impose no undue hardship on the employer, even if the individual poses no threat to the health or safety of anyone, and even if the employer acknowledges that it fired or refused to hire the individual precisely because of the impairment.

Arguing that Murphy is not disabled because he can take medication to ameliorate some of the effects of his severe hypertension but, at the same time, arguing that he is not qualified for the job precisely because he has hypertension, makes a mockery of the ADA. Congress declared that a primary purpose of the ADA was to level the playing field for "some 43,000,000 Americans [with] one or more physical or mental disabilities. . . ." 42 U.S.C. § 12101(a)(1). In a recent decision, this Court did not hesitate to give the ADA's language its full reach. *See Pennsylvania Dept. of Corrections v. Yeskey*, 118 S. Ct. 1952 (1998) (unanimously concluding, in a case involving an inmate whose impairment was *hypertension*, that Title II of the ADA applies to state prison inmates because "[s]tate prisons fall squarely within the statutory definition of 'public entity' ", *id.* at 1954, and the statutory definition of the term "qualified individual with a disability" on its face applies to state prisoners. *Id.* at 1955)).

Under the ADA, the threshold "disability" requirement is not, and rightfully so, an obstacle that forecloses any possible relief against an employer that discriminates on the basis of physical and mental impairments whose effects can be ameliorated by mitigating measures. Indeed, every tool of statutory construction points to just the opposite conclusion, *i.e.*, that the ADA's "disability" definition is inclusive.

I.

THE ADA'S "DISABILITY" DETERMINATION SHOULD BE MADE WITHOUT CONSIDERATION OF MITIGATING MEASURES.

A. The Mitigating Measures Question

Unquestionably, the "starting point for interpretation of a statute is 'the language of the statute itself.' " *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). This Court has emphasized that statutory interpretation is not typically an exercise in construing single words or phrases but, instead, the Court focuses on "the plain meaning of the whole statute, not of isolated sentences." *Beecham v. United States*, 511 U.S. 368, 372 (1994). Thus, "the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 131 (1993).

The first definition of "disability" in the ADA is "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(2)(A). This Court recently recognized that, in order to satisfy this statutory definition, an ADA plaintiff such as Murphy must demonstrate that he (1) has an "impairment" and that his impairment (2) "substantially limits" (3) one or more of his major life activities. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2202-07; *id.* at 2214 (Rehnquist, C.J., concurring in part, dissenting in part). The statutory definition does not expressly indicate whether mitigating measures should be considered or should not be considered in making the "substantially limits" inquiry. The ADA's structure, however, permits but one answer to the question, and requires rejection of the Tenth Circuit's interpretation.

Murphy's severe hypertension is a constant condition. It can be treated with medication and some of its effects limited or controlled. But Murphy's hypertension is never "cured" and it never goes away. Nor is Murphy ever completely relieved of the debilitating effects of his hypertension, medicated or not. That Murphy may able to take advantage of medication to limit the debilitating effects of his

condition often may mean, in practice, that he will not require any sort of accommodation from an employer, reasonable or otherwise. But Murphy's accomplishment should not leave him subject to discrimination based on his underlying medical condition.

Murphy should not be denied the protection of the ADA simply because he has taken the initiative or has the financial resources to limit the effects of his hypertension. Nothing in the ADA suggests that Congress's purposes included penalizing self-help. To the contrary, the ADA's inclusive "disability" definition does not, and rightfully so, exclude all those who may be able to overcome or manage their disabilities with ameliorative measures. The protections of Title I are not limited to Americans who use wheelchairs.

The ADA does not define the important terms "impairment," "substantially limits," or "major life activity," but instead expressly delegates the task of defining those terms to the EEOC. *See* 42 U.S.C. § 12116. The phrase "substantially limits" certainly refers to the effects of the "impairment," but whether the "substantially limits" requirement should be evaluated with consideration of mitigating measures or without is not stated. Indeed, the Court recently acknowledged this issue in *Bragdon*, but expressly declined to resolve it. 118 S. Ct. at 2206 (noting that the Solicitor General directed the Court "to regulatory language requiring the substantiality of a limitation to be assessed without regard to available mitigating measures," but concluding that "[w]e need not resolve this dispute in order to decide this case").

This Court has addressed the ADA directly in two recent decisions. *See Pennsylvania Dept. of Corrections v. Yeskey*, 118 S. Ct. 1952 (1998); *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998). In neither case was the Court required to decide the issue this case presents. Indeed, as noted above, in *Bragdon* the Court expressly reserved decision on the mitigating measures question. *See* 118 S. Ct. at 2206. At the same time, both decisions are consistent with an interpretation of the statute that excludes consideration of mitigating measures in making the "substantially limits" determination.

In the first of these two cases, *Yeskey*, the plaintiff, was a prison inmate whose *hypertension* precluded him from participating in a "boot camp" program. 118 S. Ct. at 1953. This Court rejected the prison's argument that prisons are not "covered entities" and that inmates are not "qualified individuals" under Title II of the ADA. Under the ADA, however, it is unnecessary to reach the "qualified individual" determination unless the plaintiff first is determined to have a "disability," which is always a threshold inquiry. The Court's opinion in *Yeskey* appears to assume that the plaintiff's hypertension was a "disability," *see* 118 S. Ct. at 1955, a position fully consistent with interpreting the ADA to require that the "substantially limits" determination be made without consideration of mitigating measures.

The second case, *Bragdon v. Abbott*, involved the question whether an asymptomatic HIV-infected woman suffered from an impairment that substantially limited a major life activity.[6] With respect to the "substantially limits" requirement, the Court first discussed the woman's risk of transmitting HIV to male sexual partners when attempting to conceive a child. Finding the risk significant, and ignoring possible mitigating measures such as artificial insemination or in vitro procedures, the Court concluded that the plaintiff's reproductive activities were substantially limited. *Id.* at 2206. Second, the Court considered the risk that the woman could transmit HIV to her child if she became pregnant. The Court acknowledged evidence suggesting that such risks could be reduced with mitigating measures, but also noted that the Solicitor General pointed out that the relevant Department of Justice regulations, like the EEOC regulations at issue in this Title I case, require "the substantiality of a limitation to be assessed without regard to available mitigating measures." *Id.* Ultimately, the Court declared that it need not decide the mitigating measures question in *Bragdon* because, even

6. The Court in *Bragdon* had little difficulty in concluding that HIV infection is an "impairment," declaring that HIV infection "is an impairment from the moment of infection." 118 S. Ct. 2196, 2204. In language that aptly describes Mr. Murphy's severe hypertension, the Court observed that the plaintiff's HIV infection in *Bragdon* was "a physiological disorder with a *constant* and *detrimental* effect on" the plaintiff's bodily systems "from the moment" the condition arose. *Id.* at 2204 (emphasis added). The Court also concluded that "reproduction is a "major life activity" under the ADA. *Id.* at 2204-05.

with such measures, the chance of infecting a child during childbirth could not be said as a matter of law not to constitute a substantial limitation. *Id.*

Although this Court in *Bragdon* reserved judgment on the mitigating measures issue, the Court's opinion is fully consistent with an interpretation of the statute that requires the "substantially limits" determination to be made without consideration of mitigating measures. For example, the Court evaluated at least one of the claimed substantial limitations — the plaintiff's inability to conceive a child because of the risk of transmission of the disease to her male partner — without regard to any possible mitigating measures.[7] Certainly, nothing in the Court's opinion is inconsistent with reading the ADA to require that mitigating measures not be considered.

UPS has argued in this and other cases that the statutory language requires consideration of mitigating measures because the statute refers to an impairment that "substantially limits" major life activities "of such individual." UPS's argument apparently is that "substantially limits" means "*currently* or *actually* substantially limits" which, of course, the statute does not say. In UPS's view, if the effects of a particular plaintiff's medical condition can be limited by medication or other measures, the impairment does not currently nor actually "substantially limit" the plaintiff. Contrary to UPS's assertion, the mere present tense usage of the term "substantially limits" in the statutory definition does not answer the question whether the "substantially limits" determination is to be made by considering mitigating measures or without considering such measures. Rather, as the First Circuit concluded, UPS's interpretation "begs the question." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 859 (1998).

Interpreting the ADA so that the "disability" determination requires the consideration of mitigating measures will mean that, in many instances, employers can reject or fire employees with a wide

7. At the conclusion of its "substantially limits" analysis, the Court also observed that "[w]hen significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." 118 S. Ct. 2196, 2206.

array of medical conditions but avoid any ADA liability. And they can do so without ever permitting such persons an opportunity to demonstrate that they are qualified for the job. *See* Robert L. Burgdorf, Jr., *The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. L. Rev. 413, 448 (1991) (describing this "Catch-22 situation").

Ultimately, the critical question is whether the first statutory "disability" definition, read in context and in light of the entire statutory scheme, means "substantially limits without mitigation" or "substantially limits with mitigation." The latter interpretation, which the Tenth Circuit adopted, is not compelled by the statutory language, nor supported by this Court's prior ADA decisions. More importantly, the Tenth Circuit's interpretation is contrary to the ADA's overall structure and operation, Congress's stated findings and purposes, the ADA's legislative history, and the uniform interpretation of the agencies Congress charged with implementing the ADA.

B. The ADA's Structure Demonstrates That The "Disability" Definition Is Inclusive

In words particularly apt to this case, the Court has observed that

> Just as a single word cannot be read in isolation, nor can a single provision of a statute. As we have recognized: "Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings *produces a substantive effect that is compatible with the rest of the law*."

Smith v. United States, 508 U.S. 223, 233 (1993) (quoting *United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)) (emphasis added); *see also King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) (a statute "is to be read as a whole, since the meaning of statutory language, plain or not, depends on context").

Reading the statutory "substantially limits" requirement to exclude consideration of mitigating measures is the only interpretation that is consistent with and faithful to the overall structure of the ADA. The "disability" inquiry is a threshold requirement. There are many indications in the ADA, and none to the contrary, that this threshold requirement does not operate as the eye of the needle for ADA plaintiffs. Rather, the threshold "disability" requirement simply confirms that plaintiffs are within the large class of Americans that Congress designed the ADA to protect.

Moreover, the threshold "disability" determination permits even plaintiffs who have either no actual impairment nor one that substantially limits a major life activity (even assuming mitigating measures are not considered), to pass through this gateway if they are discriminated against because of a "record" of an impairment or because the employer "regarded" the person as having such an impairment. 42 U.S.C. §§ 12102(2)(B), (C). When not compelled by statutory language and traditional rules of statutory interpretation, the ADA should not be read to offer no protection to Murphy simply because some of the effects of his severe hypertension can be ameliorated by medication while clearly protecting a plaintiff who does not even have an actual *impairment*, much less a *substantially limiting* one, because that person is "regarded" as disabled. Rather, Congress's use of the "record of" and "regarded as" alternatives in the statute are confirmation of the inclusiveness of the threshold "disability" definition.

Once ADA plaintiffs satisfy the threshold "disability" requirement, they still must prove that they are qualified for the job, including both that they can perform the essential functions of the job, and that any accommodations required are reasonable. 42 U.S.C. §§ 12111(8), 12112(a). At that point, the ADA plainly contemplates that assistive measures or actions be considered, by virtue of the use of the concepts of "qualified individual" and "reasonable accommodation." Indeed, it only makes sense that assistance and accommodation be considered when the question is whether the plaintiff can perform the essential functions of the job. But mitigating measures the individual alone can take, such as medication for high blood pressure, are not relevant to the threshold "disability" inquiry, nor are they the same thing as "reasonable accommodations" the employer must provide, such as

flexibility in a work schedule or permitting the individual the opportunity to actually take the medication while at work. *See* 42 U.S.C. § 12111(9) (defining "reasonable accommodation" solely in terms of employer actions).

In addition to satisfying the "qualified individual" requirement, an ADA plaintiff must prove that the employer discriminated in the terms, conditions or privileges of employment *because of* the plaintiff's *disability*, and not for some other reason. 42 U.S.C. § 12112(a). Lower federal courts generally have handled this requirement in the same fashion as under Title VII, using the burden-shifting procedures of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). Even if an individual satisfies all three statutory requirements ((1) disability, (2) qualified individual, and (3) discrimination) and therefore states an ADA claim, employers have several statutorily-recognized defenses. These include at least the following: (1) that the necessary accommodations for the employee would impose an undue hardship on the employer, 42 U.S.C. § 12112(b)(5)(A); (2) that the employee failed a "qualification standard" that "has been shown to be job-related and consistent with business necessity," 42 U.S.C. § 12113(a); *see also* 29 C.F.R. § 1630.15(e) (recognizing defense "that a challenged action is required or necessitated by Federal law or regulations"); and (3) that the employee would pose a direct threat to others in the workplace. 42 U.S.C. § 12113(b).

Importantly from a structural perspective, the term "disability" is defined in Section 3 of the ADA, a preliminary definitional section that applies to the entire Act. The terms "qualified individual with a disability," "reasonable accommodation," "undue hardship," and "direct threat," however, are defined specifically for Title I, which deals solely with employment discrimination. Thus, the definition of the threshold "disability" requirement, a prerequisite to application of *any* of the Act's Titles, not surprisingly is inclusive. Specific Title I provisions then address particular policy concerns about the effect of the ADA on employers. These more specific provisions, not the "disability" definition may, in appropriate cases, limit the statute's scope in the employment context.

In this respect, the ADA operates precisely like the Rehabilitation Act, on which it is modeled. For instance, in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), this Court considered whether an individual with tuberculosis was a "handicapped" individual under the Rehabilitation Act. Importantly, the Court explained that

> [t]he Act is carefully structured to replace . . . reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments: the definition of handicapped individual is broad, but only those individuals who are both handicapped *and* otherwise qualified are eligible for relief.

Id. at 284-85. The Court warned against making individuals "vulnerable to discrimination on the basis of mythology — precisely the type of injury Congress sought to prevent." *Id.* at 285. Importantly, in the ADA itself, Congress expressly required deference to preexisting court decisions and agency interpretations of § 504 of the Rehabilitation Act, as this Court acknowledged and followed in *Bragdon v. Abbott*. *See* 118 S. Ct. at 2202 (quoting 42 U.S.C. § 12201(a) and concluding that "[t]he directive requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act").[8]

Thus, the ADA's "substantially limits" requirement should be assessed without consideration of mitigating measures. Under this interpretation, each aspect of the statutory definition applies and has operative effect. *Cf. Walters v. Metropolitan Educational Enter's Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."). Murphy is not arguing that high blood pressure, even of the severe type from which

8. To the best of petitioner's knowledge, agency regulations implementing and interpreting the Rehabilitation Act do not directly address the mitigating measures question. What little guidance exists actually appears to support evaluating "handicaps" *without* consideration of mitigating measures. *See, e.g.*, Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99, 154 n. 295 (1999) (citing Rehabilitation Act cases). Certainly, nothing in the Rehabilitation Act regulations or cases precludes an interpretation that mitigating measures should not be considered, an interpretation that appears to have been assumed in many of those cases, but was not addressed.

he suffers, is a *per se* or inherent disability. Rather, as the ADA clearly contemplates, the "disability" determination is made in each case on an individualized basis, but without consideration of mitigating measures.[9]

C. The ADA's Formal Legislative History Confirms That The "Disability" Determination Should Be Made Without Consideration Of Mitigating Measures

Were this Court to find that, even after considering statutory language and structure, the ADA is unclear or silent with respect to the mitigating measures question, then the Court should consider legislative history as an aid to statutory interpretation, as it has traditionally done.[10] In this case, the legislative history is clear. The three congressional committees that had primary responsibility for the ADA all came down strongly and clearly in favor of a rule that mitigation should not be considered in making the "substantially limits" determination.

For instance, the House Labor Committee Report declares that

> Whether a person has a *disability* should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

H.R. Rep. No. 101-485(II), at 52 (1990) (emphasis added).

Likewise, the House Judiciary Committee Report states that "[t]he impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a *less-than-substantial limitation*." H.R. Rep. No. 101-485(III), at 28 (1990) (emphasis added). To the same effect, the Senate Labor Committee Report says that "whether a person has a *disability* should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. Rep. No. 101-116, at 23 (1989) (emphasis added). Clearer and more uniform statements of legislative intent are hard to imagine.

The only potentially countervailing legislative history is a statement in the Senate Labor Committee Report, not contained in either House Report, that provides as follows with respect to applying the third prong of the "disability" definition (the "regarded as having such an impairment" provision):

> Another important goal of the third prong of the definition is to ensure that persons with medical conditions that are under control, and that therefore do not currently limit major life activities, are not discriminated against on the basis of their medical conditions. For example, individuals with controlled diabetes or epilepsy are often denied jobs for which they are qualified. Such denials are the result of negative attitudes and misinformation.

S. Rep. No. 101-116, at 24 (1989).

---

9. This Court has more than once stated that it is bound to interpret statutes in light of the purposes Congress identified. *See, e.g., Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 118 (1983). Reading the statutory "substantially limits" requirement to exclude consideration of mitigating measures is fully congruent with Congress's detailed list of findings and purposes. *See* 42 U.S.C. § 12101.

10. Legislative history may be particularly "useful to conscientious and disinterested judges" when a statute has "bipartisan support and has been carefully considered by committees familiar with the subject matter." *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276 (1996) (Stevens, J., concurring). The House and Senate both approved the ADA by overwhelming votes, 377-28 in the House, and 91-6 in the Senate. *See Congress Clears Sweeping Bill to Guard Rights of Disabled*, Cong. Q. 2227 (July 14, 1990).

Employers such as UPS have seized upon this statement in seeking to require consideration of mitigating measures in applying the first prong of the disability definition. But it is thin justification for their argument. First, this comment appears only in the Senate report, and it is clearly made only in discussing the "regarded as" prong of the definition.

Second, and most significantly, this single paragraph in the legislative history is not actually inconsistent with the House and Senate Reports' uniform declaration that the "substantially limits" requirement is to be evaluated without consideration of mitigating measures. It is critically important to remember that there are widely varying degrees of many medical conditions. For example, blood pressure of 140/90 and above is considered "hypertension", but there are dramatic differences between a blood pressure of 140/90 and Murphy's unmedicated blood pressure of 250/160. Moreover, at least in certain age groups, such as older Americans, a blood pressure of 140/90 may be within the "normal" range, and therefore might not be considered substantially limiting at all.[11] But the ADA still protects such an individual from discrimination by an employer that wrongly "regards" blood pressure of 140/90 as a "disability."

The Senate Report does not specify the degree of impairment experienced in the example. Individuals with mild cases of diabetes or epilepsy that can be ameliorated without medication or with relative ease may in some cases not be substantially limited even if the evaluation is made without considering mitigating measures. But when an employer acts adversely to such an individual due to an exaggerated fear of or misunderstanding about that individual's condition, then the "regarded as" prong applies. Thus, at a minimum, the legislative history demonstrates that the Tenth Circuit erred. Murphy has a "disability", either because his hypertension substantially limits major life activities or because UPS "regarded" him as so limited.

---

11. The EEOC has defined "substantially limits" in part by requiring a comparison of the ADA plaintiff to "the average person in the general population." *See* 29 C.F.R. Pt. 1630.2(j)(i), (ii). The interpretive guidance also makes clear that this determination is relative to an *average* person. *See* 29 C.F.R. Pt. 1630.2(j), App. (individual is not substantially limited if the limitation "does not amount to a significant restriction when compared with the abilities of the average person.").

D. The EEOC's Formal Interpretation That Mitigating Measures Should Not Be Considered Is Entitled To *Chevron* Deference

1. *The EEOC, The Agency Congress Expressly Charged With Implementing Title I, Requires That The "Substantially Limits" Assessment Be Made Without Consideration Of Mitigating Measures*

Even were there any doubt, after applying this Court's usual rules of statutory construction, that the Tenth Circuit's reading of the ADA "disability" definition is wrong, this case should be resolved in Murphy's favor. In the ADA itself, Congress expressly granted the EEOC the authority — and charged it with the obligation — to "issue regulations in an accessible format to carry out this subchapter [Title I — Employment]."[12] 42 U.S.C. § 12116. The EEOC did so,

---

12. Congress provided the EEOC one year to propose, receive comments and finalize regulations to implement the ADA's employment provisions. Pursuant to this statutory grant of authority, the EEOC published an "Advance notice of proposed rulemaking" soliciting initial public comment on August 1, 1990. 55 Fed. Reg. 31192 (1990). On February 28, 1991, the EEOC published its proposed regulations and interpretive guidance. 56 Fed. Reg. 8578 (1991). Importantly, the proposed regulations also contained the full text of the interpretive guidance appendix, including the assertion that "disability" must be assessed without regard to mitigating measures and using the example of an insulin-dependent diabetic. *See* 56 Fed. Reg. at 8592-93. The EEOC pointed out that "[t]his proposed appendix represents the Commission's interpretation of the issues discussed and the Commission will be guided by it when resolving charges of employment discrimination." *Id.* at 8578.

When the EEOC published its final rules and interpretive guidance on July 26, 1991, the interpretive guidance requiring assessment without mitigating measures was essentially unchanged. *See* 56 Fed. Reg. 35726 (1991). The sole revision was to

> the interpretive guidance accompanying § 1630.2(j) to make it clear that the determination of whether an impairment substantially limits one or more major life activities is to be made without regard to the availability of medicines, assistive devices, or other mitigating measures. . . .

56 Fed. Reg. at 35727-28.

simultaneously issuing *both* regulations *and* interpretive guidance pursuant to formal rulemaking procedures. Critically, the EEOC's interpretive guidance (an appendix to the formal regulations) includes the following provision, which expressly addresses the question before this Court:

> Section 1630.2(j) Substantially Limits
>
> * * * *
>
> The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.

Thus, with respect to the question whether the "substantially limits" assessment should include or exclude consideration of mitigating measures, the EEOC, after following formal notice and comment rulemaking procedures, expressly rejected the interpretation that the Tenth Circuit endorsed in this case.

2. *As In Bragdon v. Abbott, This Court Must Defer To The Implementing Agency's Permissible Construction Of The ADA*

In *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), this Court resolved the question whether asymptomatic HIV infection constitutes a "disability" under the ADA. In concluding that such a condition is a "disability," the Court relied heavily on "administrative guidance issued by the Justice Department to implement the public accommodation provisions of Title III of the ADA." *Id.* at 2208-09. Specifically, the Court observed that

> [a]s the agency directed by Congress to issue implementing regulations, to render technical assistance explaining the responsibilities of covered individuals and institutions, and to enforce Title III in court, the Department's views are entitled to deference.

118 S. Ct. at 2209 (internal statutory citations omitted; citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). Moreover, the Court in *Bragdon* also considered the views of other federal agencies charged by Congress with implementing other Titles of the ADA, including the EEOC's views with respect to Title I. 118 S. Ct. at 2209. Importantly, the Court in *Bragdon* relied upon DOJ and EEOC interpretive guidance, not just formal regulations. *Id.*

The familiar *Chevron* analysis in this situation is to first consider whether the language of the statute and congressional intent are clear and unambiguous with respect to the question raised. If so, then a court must give effect to that language and intent, rather than defer to an agency interpretation. *Chevron*, 467 U.S. at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* The "permissible construction" inquiry does not require the court to

> conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.

Id. at 843 n. 11.[13]

---

13. The *Chevron* doctrine has been described as "an across-the-board presumption that, in the case of ambiguity, agency discretion is meant." The Honorable Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 516 (1989). This presumption

> operates principally as a background rule of law against which Congress can legislate. . . . Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known.

Id. at 517.

(Cont'd)

Although it is unnecessary for the Court to reach the *Chevron* deference question at all, in light of the ADA's structure and clear congressional intent that mitigating measures should not be considered, *Chevron* deference is applicable in this case if the Court considers the EEOC's interpretation. First, the statutory "disability" definition itself does not expressly state a rule for mitigating measures, although the ADA's structure and congressional intent are clear that such measures should not be considered. Second, Congress expressly directed the EEOC to issue regulations implementing the provisions of Title I. Third, the EEOC adopted such regulations and interpretive guidance pursuant to formal notice and comment procedures. Thus, the EEOC's interpretation of the "substantially limits" requirement is entitled to *Chevron* deference. As this Court recently observed, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT&T Corp. v. Iowa Util. Bd.*, 119 S. Ct. __, 67 U.S.L.W. 4104, 4112 (Jan. 25, 1999).

That the determinative EEOC interpretation is contained in an interpretive guidance appendix, rather than the regulations themselves, is of no significance. First, the EEOC promulgated the regulations *and* the interpretive guidance pursuant to formal notice and comment procedures. The EEOC received comments on the interpretive guidance at issue here, and revised the guidance as a result of the formal process.

Second, this Court has not drawn a distinction between formal regulations and formal agency interpretations of such regulations, either in general or specifically under the ADA. For example, in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), in deciding whether tuberculosis is a "disability" under the Rehabilitation Act,

---

(Cont'd)

> If *Chevron* is to have any meaning, then, congressional intent must be regarded as "ambiguous" not just when no interpretation is even marginally better than any other, but rather when two or more reasonable, though not necessarily equally valid, interpretations exist.

Id. at 520.

this Court considered the appendix that the Department of Health and Human Services promulgated with its Rehabilitation Act regulations. 480 U.S. at 280 n.5. Similarly, in *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991), the Court declared that "we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." Thus, whether the critical interpretation appears in the EEOC's regulations or the interpretive guidance appendix, this Court's "task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

Third, in this case, the EEOC's interpretive guidance is not contrary to the language of the statute nor the clearly expressed intent of Congress. To the contrary, the EEOC's interpretation is the only one that is consistent with the ADA's structure and congressional intent. Moreover, the EEOC has adopted the same interpretation of the statute as the Department of Justice, which is statutorily charged with implementing Titles II and III of the ADA. *See* 28 C.F.R. Pt. 35, App. A § 35.104 ("The question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services"); 28 C.F.R. Pt. 36, App. B § 36.104 (to same effect). As the agencies uniformly recognize, the statutory language, the structure and purposes of the ADA, and the legislative history all demonstrate that making the "substantially limits" determination without consideration of mitigating measures is the best reading of the statute, not just a "permissible" one.

At worst, the "disability" definition's "substantially limits" requirement is phrased in such a way that a "reasonable person could interpret the plain statutory language to require an evaluation either before or after ameliorative treatment," *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 859 (1st Cir. 1998), as the Circuit split on this issue may demonstrate. Accordingly, the EEOC's view of the statute is entitled to *Chevron* deference. *See AT&T Corp. v. Iowa*

Util. Bd., 119 S. Ct. __, 67 U.S.L.W. 4104, 4112 (Jan. 25, 1999) ("Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency."); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council*, 470 U.S. 116, 126 (1985) (to same effect); *cf. Washington v. HCA Health Serv. of Texas, Inc.*, 152 F.3d 464, 470 (5th Cir. 1998) ("Although we think it is more reasonable to say that mitigating measures must be taken into account, we recognize that our position is not so much more reasonable to warrant overruling the EEOC").

E. In Any Event, There Are At A Minimum Genuine Issues Of Disputed, Material Fact Concerning Whether Murphy's Severe Hypertension Substantially Limits His Major Life Activities

The Tenth Circuit rejected Murphy's ADA claim as a matter of law at the summary judgment stage of this litigation. The Tenth Circuit held that the first prong of the "disability" definition requires consideration of mitigating measures and that, as a matter of law, Murphy's severe hypertension does not substantially limit any major life activities when medication is considered. Pet. App. 4a. The Tenth Circuit then concluded, again as a matter of law, that Murphy also failed to state a claim under the "regarded as" prong of the definition because UPS fired him because of DOT regulations, and not because of his hypertension. *Id.* at 5a.

With all due respect, the Tenth Circuit misapplied the summary judgment standard and ignored any facts that got in the way of the court's conclusions. Contrary to the Tenth Circuit's application of the summary judgment standard, this Court has consistently emphasized that, when ruling on a summary judgment motion, federal courts must view the evidence in the light most favorable to the non-moving party, with disputed facts and inferences drawn in favor of that party and against the moving party. *See Gen. Elec. Co. v. Joiner*, 118 S. Ct. 512, 517 (1997). The Tenth Circuit simply failed to do that in this case.

There is no factual dispute in this case that since at least age 10, Murphy has suffered from severe Stage IV hypertension, with his

unmedicated blood pressure running approximately 250/160. Pet. App. 2a, 9a. Nor is there any dispute that Murphy's condition is permanent, J.A. 67a, 71a, that the long term impact of such severe hypertension is major organ damage, for instance to his heart, kidneys and eyes, *id.* at 64a, 72a, and that Murphy's condition ultimately may kill him.[14] *Id.* at 81.

There also is evidence and testimony in the record that Murphy's severe hypertension substantially limits numerous major life activities, such as running, lifting, eating, hearing, seeing, and working. J.A. 56a-58a, 51a-52a. Thus, if mitigating measures are ignored, the evidence precludes a grant of summary judgment to UPS on the "substantially limits" requirement of the statutory definition. Indeed, UPS disputes this evidence but, at a minimum, this evidence creates genuine issues of disputed, material fact.

Even if this Court interprets the "substantially limits" inquiry to require consideration of mitigating measures, summary judgment for UPS is improper. There is evidence in the record that Murphy is substantially limited in major life activities *even when medicated.* For example, Murphy testified that he has brought his blood pressure below 140/90 with medication, but that the side effects significantly limited his ability to function. J.A. 55a-56a. Those side effects included gout and lethargy that kept him bedridden for days at a time, making it difficult if not impossible for him to work. *Id.* at 51a. Even the District Court acknowledged that Murphy is unable to use medication to lower his blood pressure to normal levels "without suffering severe side effects such as stuttering, loss of memory, impotence, lack of sleep and irritability." Pet. App. 16a.[15]

14. Thus, there is no question that Murphy suffers from an "impairment" within the meaning of the ADA. *Cf. Bragdon v. Abbott*, 118 S. Ct. 2196, 2204 (1998) (HIV infection is an "impairment" under the ADA from "the moment of infection" because it has "a constant and detrimental effect on" the individual's bodily systems).

15. Murphy suggested that he might be able to bring his blood pressure below 160/90, perhaps as low as 140/90, without suffering serious side effects from the medication. J.A. 55a-56a. His physician also testified that for Murphy to get his blood pressure down to approximately 150/100 with medication is "in the realm of possibility." *Id.* at 68a.

In any event, at this stage of the litigation, the question is not what evidence a District judge or Court of Appeals judges would find most credible or persuasive, but whether there are genuine issues of disputed, material fact with respect to the question whether Murphy's undisputed impairment "substantially limits" one or more of his major life activities. At a minimum, there are disputed material facts here, and that precludes summary judgment in UPS's favor.

II.

UPS FIRED MURPHY BECAUSE UPS "REGARDED" HIM AS DISABLED.

A. By Its Reliance Upon DOT Regulations, As A Matter Of Law UPS Fired Murphy Because It "Regarded" Him As Disabled

The ADA "disability" provision has three alternatives for defining the term "disability." An impairment that substantially limits major life activities is only the first one. Having a "record" of such an impairment or being "regarded" as having such an impairment also constitute a "disability" that qualifies an individual for ADA protection. 42 U.S.C. §§ 12102(2)(B), (C). In this case, UPS fired Murphy because it "regarded" him as having a disability. The Tenth Circuit erroneously endorsed UPS's action. The Tenth Circuit's rationale was that UPS fired Murphy "because his blood pressure exceeded the DOT's requirements." Pet. App. 5a. In the Tenth Circuit's view, UPS's reliance on the DOT regulations necessarily meant that UPS did not "regard" Murphy as disabled. *Id.* In fact, UPS's reliance compels the contrary conclusion.

The rationale for the "regarded as" definition is that, "although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling." H.R. Rep. No. 101-485(III), at 30. As this Court recognized when interpreting the Rehabilitation Act, the model for the ADA,

> [s]uch an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.

School Bd. of Nassau County v. Arline, 480 U.S. 273, 283 (1987). Thus, with respect to the Rehabilitation Act, but in language equally applicable to the ADA, this Court has emphasized that "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." *Id.* at 284.

The EEOC regulation implementing the "regarded as" provision, 29 C.F.R. § 1630.2(*l*), recognizes these principles and defines the concept as follows:

> (l) Is regarded as having such an impairment means:
>
> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
>
> (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> (3) Has none of the impairments defined in paragraphs (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

The EEOC interpretive guidance for this regulation further states that:

> An individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has controlled high blood pressure that is not substantially limiting. If an employer reassigns the employee to less strenuous work because of

> unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled.

29 C.F.R. § 1630.2(*l*) App.

The EEOC's position with respect to high blood pressure in this quotation superficially may appear at odds with its general position that mitigating measures should not be considered in making the "substantially limits" assessment. As explained above in Part I.C., of this brief, however, the positions can be reconciled. It is critically important to remember that there are widely varying degrees of high blood pressure, with blood pressure of 140/90 and above considered "hypertension." Thus, particularly depending upon a person's age group, blood pressure of 140/90 may not even be abnormal and, in comparison to an "average" person, might not be considered substantially limiting at all. But, in any event, the ADA still protects such an individual from discrimination by an employer that wrongly "regards" blood pressure of 140/90 as a "disability." Thus, at a minimum, the EEOC's interpretive guidance demonstrates that Murphy has a "disability", whether because he has an impairment that substantially limits major life activities or because UPS regarded him as having such an impairment.

The ADA's structure is such that the "disability" determination is only the threshold requirement for a plaintiff seeking to establish an ADA claim. This threshold inquiry is not the point at which the statute contemplates judgments being made about whether an individual is qualified for the job, whether any accommodations are feasible, or whether the employer has in fact discriminated against the individual. Those inquiries come later in the statutory scheme.

Thus, even were UPS and the Tenth Circuit correct in their understanding of the DOT regulations, it would make *no* difference with respect to the threshold "disability" inquiry. The DOT regulations, if they actually precluded Murphy from obtaining a DOT health card, might be relevant to the question whether Murphy is a "qualified individual with a disability," or they might be a *defense* to

Murphy's claim. But DOT regulations have nothing to do with the question whether UPS "regarded" Murphy as having a "disability," the threshold inquiry in any ADA case. It would make no sense to say that Murphy is not disabled if a job requires a DOT health card — because his blood pressure is too high to meet DOT regulations — and yet he might be considered to have a "disability" with respect to many other jobs that have no such requirement.

UPS indisputably "regarded" Murphy as having an impairment, severe hypertension, whether medicated or not — that substantially limits him in the major life activity of working.[16] UPS "regarded" Murphy as unfit to work precisely because of his high blood pressure. Whether that view was based on misperceptions of the medical risks of Murphy's condition, stereotypes about people with high blood pressure, or even a good faith, legally justified belief that Murphy's blood pressure was too high for him to qualify for a DOT health card, does not matter in making the threshold "disability" determination. It is sufficient for purposes of that inquiry that UPS believed, for whatever reason, that Murphy's high blood pressure precluded him from performing a class of jobs.[17] Employers need not act with sinister or evil motives in order to "regard" an employee as disabled. *See, e.g., Deane v. Pocono Med. Ctr.*, 142 F.3d 138, 144 (3d Cir. 1997).

On this basis alone, the Tenth Circuit's judgment must be reversed. As a matter of law, UPS regarded Murphy as disabled. There

---

16. For example, Murphy offered evidence that he was fired precisely because of his high blood pressure. He testified that a UPS supervisor told him he (Murphy) was fired "because of my hypertension." J.A. 53a; *see also id.* at 105a. The supervisor who fired Murphy also admitted that he had received no training concerning the requirements of the ADA and that he was "not really" familiar with the law, declaring that he knew little more than that "they have to put up wheelchair signs." Record 380 (Rudy Arzola Deposition, p. 42).

17. DOT certification is required for "all employers, employees and commercial motor vehicles, which transport property or passengers in interstate commerce." 49 C.F.R. § 390.3(a). Inability to obtain certification therefore implicates "a class of jobs or a broad range of jobs in various classes." 29 C.F.R. § 1630.2(j)(3)(i).

are no genuine issues of disputed, material fact concerning this question. By its admitted and exclusive reliance upon the DOT regulations, UPS has conceded this issue. Irrespective of what the DOT regulations actually require, the Tenth Circuit's legal error in endorsing UPS's conduct requires reversal.

B. UPS's Argument That Murphy's Hypertension Necessarily Disqualifies Him From Obtaining A DOT Health Card Is Incorrect As A Matter Of Law

UPS's justification for firing Murphy, which the Tenth Circuit endorsed, was that Murphy cannot qualify for a DOT health card. As the Solicitor General already has informed this Court, "the court of appeals' holding on this point was a clear legal error." Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae on Petition for a Writ of *Certiorari* 19.

UPS ostensibly fired Murphy because his blood pressure exceeded 160/90, the standard UPS now claims is an absolute limitation imposed by DOT regulations, although UPS's nurse initially claimed that 140/90 or 140/80 was UPS's standard. J.A. 47a, 88a-89a, 93a-94a. The relevant DOT regulations in fact provide as follows:

> 49 C.F.R. § 391.41
>
> (a) A person shall not drive a commercial motor vehicle unless he/she is physically qualified to do so. . . .
>
> (b) A person is physically qualified to drive a commercial motor vehicle if that person . . .
>
> (6) Has no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely.
>
> 49 C.F.R. § 391.43
>
> (e) The medical examination shall be performed, and its results shall be recorded, substantially in accordance with the following instructions . . .

> *Blood pressure*. Record with either spring or mercury column type of sphygmomanometer. If the blood pressure is consistently above 160/90 mm. Hg., further tests may be necessary to determine whether the driver is qualified to operate a commercial motor vehicle.

Thus, on their face, the regulations do not impose an absolute limit of 160/90, nor do they automatically disqualify anyone and everyone who exceeds that blood pressure from obtaining a DOT health card.

The lower courts and UPS instead relied upon a 1988 Federal Highway Administration document entitled "Medical Advisory Criteria for Evaluation Under 49 C.F.R. Part 391.41." *See* Pet. App. 15a-16a.[18] The document, which states in its first paragraph that "[m]ost commercial drivers with hypertension are not immediately unqualified to operate a commercial motor vehicle," J.A. 98a, declares that no driver with blood pressure higher than 181/105 may be qualified to operate a commercial motor vehicle. *Id.* at 99a. The document further directs, however, that drivers with blood pressure between 160/90 and 181/105 — which Murphy's blood pressure was when UPS retook it in late September following the nurse's review of his file, *see id.* at 47a-48a, may drive for three months and be retested to see whether their blood pressure has been reduced by measures such as medication. *Id.* at 98a.

The DOT regulation, in contrast, states only that a driver is required to have "no current clinical diagnosis of high blood pressure *likely to interfere with his/her ability to operate a commercial motor vehicle safely*." 49 C.F.R. § 491.31(b)(6) (emphasis added). The regulation clearly contemplates that the ultimate decision regarding a driver's fitness rests in the discretion of the DOT examiner, at least within certain bounds that Murphy satisfied.

Thus, regardless of whether UPS fired Murphy because of unsubstantiated fears concerning his hypertension or the legally erroneous belief that Murphy could not possibly qualify for a DOT health card, UPS "regarded" Murphy as having an impairment that substantially limits his ability to work. In theory, UPS's erroneous claim that Murphy cannot

---

18. For the Court's convenience, this document is included in the Joint Appendix, 98a-101a.

satisfy DOT regulations, were it actually correct, perhaps might permit UPS to argue that Murphy is not a "qualified individual with a disability," 42 U.S.C. § 12111(8), or that he fails to satisfy a "qualification standard" that "has been shown to be job-related and consistent with business necessity." *Id.* § 12113(a). But UPS's purported reliance on DOT requirements supports rather than undermines the conclusion that UPS "regarded" Murphy as having an impairment that substantially limits his ability to work. Murphy's perceived limitations were the very basis UPS regarded Murphy as unfit to work and, therefore, fired him.

CONCLUSION

With all due respect, Vaughn Murphy's severe hypertension either substantially limits one or more of his major life activities, or UPS "regarded" him as disabled. For the foregoing reasons, Murphy respectfully requests that this Court reverse the judgment of the Tenth Circuit, and remand the case for further proceedings.

Respectfully submitted,

KIRK W. LOWRY
Counsel of Record
PALMER, LOWRY
LEATHERMAN & WHITE LLP
112 West Sixth, Suite 102
Topeka, Kansas 66603
(785) 233-1836

STEPHEN R. McALLISTER
University of Kansas
School of Law
Green Hall
Lawrence, Kansas 66045
(785) 864-4550

Attorneys for Petitioner